

Decision 02-09-038 September 19, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company
for Authorization under Public Utilities Code
Section 851 to Grant a Permanent Overhang
Easement to Delta Energy Center, LLC for an
Aerial Crossing of Pacific Gas and Electric
Company Property by a Generation Tie Line.

Application 02-04-033
(Filed April 17, 2002)

**OPINION GRANTING APPROVAL UNDER
PUBLIC UTILITIES CODE SECTION 851 FOR AN EASEMENT
ON UTILITY PROPERTY**

We grant the Application¹ of Pacific Gas & Electric Company (PG&E) for approval of an easement on PG&E land under Public Utilities Code Section 851.² The easement is needed to permit Delta Energy Center, LLC (Delta Energy) to operate and maintain an 83-foot section of a 3.3 mile single 230 kilovolt (kV) electric transmission line (Delta Transmission Line) from the Delta Energy generation facility located in Pittsburg, California to the point of interconnection with PG&E at the Pittsburg Substation. The PG&E property consists of PG&E fee land and the PG&E facilities situated on that land. While we disagree with Applicant's assertion that the Commission need not perform any environmental

¹ *Pacific Gas and Electric Company's Application For Authorization Under Public Utilities Code Section 851 To Grant A Permanent Overhang Easement to Delta Energy Center, LLC for an Aerial Crossing of Pacific Gas and Electric Company Property By A Generation Tie Line.*

² All statutory references are to the Public Utilities Code unless noted otherwise.

review of this Section 851 application, we acknowledge that prior environmental reviews performed by the California Energy Commission (CEC) for the entire Delta Energy Center project establish that the environmental impact of this easement is not significant and such prior reviews may be relied on by the Commission in this proceeding.

Background

The Delta Energy generation facility (Delta Plant) is an 880 megawatts (MW) combined cycle natural gas fired power plant located on a 20-acre parcel in Pittsburg, California scheduled to come on line in Summer 2002. The Delta Transmission Line, a new 3.3-mile 230 kV electric transmission line, interconnects the Delta Plant to the electric transmission grid at PG&E's Pittsburg Substation. The Delta Transmission Line runs both overhead and underground in its route from the Delta Plant to the Pittsburg Substation. In order to connect with PG&E's facilities at the substation, the transmission line makes a transition from underground to overhead via a "Transition Structure" constructed on PG&E-owned land pursuant to a Commission approval granted August 31, 2001 (Decision (D.) 01-08-069 (2001)), and modified on March 21, 2002 (D.02-03-052 (2002)).

The Application

On April 17, 2002, PG&E filed its application, seeking authorization from the Commission to grant an easement for the aerial crossing. PG&E's application is made under Section 851, which requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the

public.³ Granting of an easement is an encumbrance, and therefore requires approval under Section 851.⁴

³ Section 851 reads:

No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5 of this part, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture. Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value; provided, however, that nothing in this section shall apply to the interchange of equipment in the regular course of transportation between connecting common carriers.

⁴ As the Commission previously stated: “The language of Section 851 is expansive, and we conclude that it makes sense to read “encumber” in this statute as embracing the broader sense of placing a physical burden, which affects the physical condition of the property, on the utility’s plant, system, or property.” (D.92-07-007, 45 CPUC2d 24, 29.)

Analysis And Action

We grant PG&E's request under Section 851. In reaching this decision, we have considered the filings of PG&E, current state policy on electrical generation plants (as expressed in the Governor's Executive Orders), and applicable state law and Commission decisions.

The purpose of the easement is unquestioned. It will permit the electric transmission line from the new Delta Plant to interconnect with the electric transmission grid. This use is consistent with the use of the utility properties in question. The Pittsburg substation, which has previously served as the interconnection point for the Pittsburg power plant, is a logical point of interconnection for power generated by the Delta Plant.

PG&E states that the granting of the easement will not interfere in any way with the operation of PG&E's 115 kV transmission lines, or with the provision of service to PG&E's customers.

The task of the Commission in a Section 851 proceeding is to review the transaction, "[T]o ensure that it will not impair the utility's ability to provide service to the public." (D.96-04-045.) Or, as was stated in relation to Section 51(a), the predecessor to Section 851: "The obvious purpose of this section is to enable the Railroad Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition to the transfer, as the public interest may require." (Decision 3320 (1916) 10 CRRC 56, 63.)

We have reviewed the easement agreement submitted by PG&E, and find that it does not appear to impair PG&E's ability to provide utility service to the public. The easement is limited to the placement of single 230 kV transmission line across PG&E's property. (Paragraph 1.) Delta Energy bears the cost of

erecting and maintaining the transmission line and providing security therefore (Paragraph 4) and broadly indemnifies PG&E against any loss or cost associated with the construction, operation and maintenance of the transmission line (Paragraph 5). PG&E reserves all rights in the PG&E property except for the easement (Paragraph 8) and reserves the right to relocate the line in the future (Paragraph 9). Delta Energy agrees to provide broad form insurance coverage for the property and its operations thereon, naming PG&E as an additional insured (Paragraph 10 and Exhibit “B”) and to keep the property free of mechanic’s liens (Paragraph 11).

Furthermore, we believe that the proposed use of the easement does not go beyond uses approved by the CEC in its environmental review process. Otherwise, we would potentially be approving activities that had not received environmental review.

Paragraphs 16 and 17 of the Easement address potential assignments of the easement, including an assignment as collateral security for future indebtedness of Delta Energy, and require PG&E to execute certain instruments in the event of such assignments. Should PG&E do so, it cannot via that process grant any additional rights beyond those contained in the agreements before us today without prior Commission approval. Similarly, any assignee does not take any further rights than those contained in the Commission-approved agreements.

Environmental Review

In its application, PG&E states that California Environmental Quality Act (CEQA) review is not required for this Section 851 application because the instant overhang/aerial crossing activities were previously evaluated as part of the environmental review performed by the CEC for the larger Delta Energy

project. PG&E further points out that the Commission previously relied on the CEC's environmental review for the project in D.01-08-069.

While we do not agree with the assertion that the Commission need not perform any environmental review of this Section 851 application, we do acknowledge the relevance of prior environmental review activities for the project. Specifically, because CEQA applies to discretionary projects to be carried out or approved by public agencies and because the Commission must act on the Section 851 application and issue a discretionary decision without which the project cannot proceed, the Commission must act as either a Lead or Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA guidelines Section 15051(b)).

In this case, CEC is the Lead Agency. The CEC environmental review process and associated documents are functionally equivalent to the traditional CEQA preparation of an Environmental Impact Report. The Commission is a Responsible Agency for this proposed project. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the Lead Agency environmental documents and findings before acting upon or approving the project. (CEQA guidelines 15050(b)). The specific activities that must be conducted by a Responsible Agency are contained in CEQA guidelines Section 15096.

A brief summary of CEC's environmental review of the Delta Energy project is as follows:

On December 18, 1998 an Application for Certification was filed with the CEC for authority to construct The Delta Energy Center 880 megawatt generation facility in the Pittsburg area (Docket 98-AFC-3).

On July 23, 1999, a Preliminary Staff Assessment (PSA) of the Delta Energy project was completed, following which CEC staff conducted workshops to take comments from the public; interveners; local, state and federal agencies; and the applicant.

On September 20, 1999, the CEC released a Final Staff Assessment (FSA) that formally addressed all comments received on the PSA. Throughout the process, the CEC sought to develop alternatives that would mitigate the impacts of the project to the greatest extent possible. The FSA incorporates both resource impact mitigation measures and a monitoring program designed to reduce impacts to a less-than-significant level in a number of areas including Land Use; Transportation and Circulation; Air Quality; Hydrology and Water Quality; Noise, Aesthetics; Biological Resources; Geology; Cultural Resources; and Public Facilities.

On February 9, 2000, the CEC approved the Delta Energy Center and certified the FSA (SCH #20000029004); adopted the Findings of Fact, including applicable mitigation measures and a Compliance Plan. A Notice of Determination was subsequently filed with the state Office of Planning and Research, in compliance with Sections 21108 and 21152 of the Public Resources Code.

We have reviewed and considered the PSA, FSA and the discretionary Decision by the CEC and find that these documents are adequate for our decision-making purposes under CEQA. We conclude that there is substantial evidence that no proposed alternative site would avoid or substantially lessen

any potential direct, indirect or cumulative significant impacts of the project and that the alternative analysis complies with the requirements of the Warren-Alquist Act and the CEQA. We find that the CEC reasonably concluded that the proposed project, including the mitigation measures in the FSA and the Compliance Plan contained in Section IV of the CEC Decision, avoids and/or reduce the impacts of the project to a less-than-significant level.

Assignment of Proceeding

This matter is assigned to Commissioner Wood and Administrative Law Judge (ALJ) Prestidge. ALJ Prestidge is the presiding officer for this proceeding.

Uncontested Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. In order for Delta Energy to interconnect with PG&E, an aerial easement on PG&E property is required.
2. The purpose of the easement is consistent with the current uses of the related PG&E properties.
3. The easement will not impair PG&E's ability to provide service to the public.
4. The CEC has conducted an environmental review that includes the proposed easement.
5. The proposed project, including the mitigation measures and monitoring protocols contained in Section IV of the CEC Decision, avoids and/or reduces the impacts of the project to a less-than-significant level.

6. There is substantial evidence in the record that the alternatives are infeasible because they would not avoid or substantially lessen any potential direct, indirect, or cumulative significant impacts of the project.

Conclusions of Law

1. Granting the requested easement is in the public interest.
2. The EIR and the discretionary Decision by the CEC are adequate for the Commission's decision-making purposes as a Responsible Agency under CEQA.
3. This decision should be effective today in order to allow Delta Energy to expeditiously obtain the easement from PG&E.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company's Application for authority to grant an aerial easement on utility property is granted, as described above.
2. This proceeding is closed.

This order is effective today.

Dated September 19, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners